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Filed March 17, 1945

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

Civil Action

No. 5610

ALABAMA HIGHWAY EXPRESS, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants

JURISDICTIONAL STATEMENT BY PLAINTIFF UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

Plaintiff respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

A. Statutory Provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38, Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

B. Date of the Judgment or Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Was Presented.

The decree sought to be reviewed was entered on March 5, 1945. The petition for appeal was presented and allowed on March 10, 1945, together with an assignment of errors.

C. Nature of Cause and of Rulings Below

This is an appeal from a final decree of the District Court of the United States for the Northern District of Alabama, Southern Division, entered March 5, 1945. By said de-

cree the Court ordered, adjudged, and decreed that the injunction and other relief prayed for in the complaint be denied and that the suit be dismissed. By the said suit plaintiff had prayed the Court to restrain, enjoin, and suspend the operation, execution, and the effect and enforcement of an order of the Interstate Commerce Commission (Division 5), entered July 27, 1944, in its joint report (mimeographed—not to be printed in full in the permanent series of motor-carrier reports of the Interstate Commerce Commission) in the proceedings entitled No. MC-71516 Alabama Highway Express, Inc., Common Carrier Application, by the terms of which the Interstate Commerce Commission denied in part the application of this plaintiff for a certificate of public convenience and necessity by so limiting the authority granted so as not to include the entire State of Alabama as base area of operations.

Following the issuance of the said report of the Interstate Commerce Commission (Division 5), plaintiff filed its petitions, dated August 30, 1944 and September 8, 1944, praying that the entire membership of the Interstate Commerce Commission grant reconsideration, oral argument, or further hearing. The said petitions were denied by the Interstate Commerce Commission on November 7, 1944, although in the meantime the effective date of the aforesaid order of the Commission was postponed from time to time.

The principal grounds stated in the complaint in this Court are (a) that the Interstate Commerce Commission acted arbitrarily and capriciously, in excess of its statutory power, and contrary to the indisputable character of the evidence, in limiting the plaintiff's base area to less than the State of Alabama, and (b) that the Interstate Commerce Commission misapplied the law to the undisputed facts as shown by the orders of the Commission and the record in

this case. Said grounds are predicated principally upon the following errors of the Interstate Commerce Commission:

(1) In limiting plaintiff's base area to a sixty-five mile radius of Birmingham, Alabama.

(2) In not fixing the entire State of Alabama as plaintiff's base area.

The decision of the lower Court, if allowed to stand, would seem to establish the principle that findings by the Interstate Commerce Commission, merely because couched in the language of the statute, are sufficient in the absence of supporting findings of fact based upon evidence of record. This is directly contrary to well-recognized principles of judicial review. *Florida* v. *United States,* 282 U. S. 194. Accordingly, it is important that this decision be reviewed.

D. Cases Sustaining the Jurisdiction of the Supreme Court of the United States on Appeal

Board of Trade of Kansas City v. *United States,* 314 U. S. 534.

Union Stock Yard Co. v. *United States,* 308 U. S. 213.

United States v. *Pan American Petroleum Corp.,* 304 U. S. 156.

United States v. *American Sheet & Tin Plate Co.,* 301 U. S. 402.

United States v. *Baltimore & Ohio R. R. Co.,* 293 U. S. 454.

Mississippi Valley Barge Co. v. *United States,* 292 U. S. 282.

Florida v. *United States,* 292 U. S. 1.

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United States v. *Meher,* 307 U. S. 148.
United States v. *Carolina Freight Carriers Corp.,* 315 U. S. 475.
Howard Hall Co., Inc. v. *United States,* 315 U. S. 495.

E. Decree and Opinion of the District Court

Appended to this statement are copies of the opinion, findings of fact, conclusions of law, and final decree of the District Court.

Plaintiff, therefore, respectfully submits that the Supreme Court of the United States has jurisdiction of the appeal.

LEO P. KITCHENS,
D. H. MARKSTEIN, JR.,
Attorneys for Plaintiff.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

CIVIL ACTION No. 5610

ALABAMA HIGHWAY EXPRESS, INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendant*

Findings of Fact and Conclusions of Law

The above-styled cause came on for final hearing before this duly constituted three-judge Court on February 5, 1945, and was submitted for final decree upon the pleadings, the evidence, the arguments, and briefs of counsel for the respective parties. The Court makes and enters its findings of fact and conclusions of law, as follows:

FINDINGS OF FACT

1. On or about February 8, 1936, Alabama Highway Express, Inc., an Alabama corporation, filed its application with the Interstate Commerce Commission (hereinafter called the Commission) under Section 209(a) of the Interstate Commerce Act (49 U. S. C. A. 309(a)) for a "grandfather" permit authorizing operations as a contract carrier by motor vehicle in interstate or foreign commerce of general commodities, except explosives, to and from points in Alabama, Louisiana, Georgia, Mississippi, Maryland, Tennessee, Virginia, North Carolina, South Carolina, Florida, West Virginia, Pennsylvania, New Jersey, Kentucky, New York, Ohio, Michigan, Illinois, Missouri, and the District of Columbia; also, ocean freight received from all steamship lines coming into the Port of Mobile, Alabama, destined to points in Alabama, Mississippi, Georgia, Tennessee, Louisiana, and Florida, all over irregular routes. Upon said application, the Commission instituted a proceeding desig-

nated No. *MC-71516 Alabama Highway Express, Inc., Common Carrier Application.* Protests were filed by competing carriers by railroad and motor vehicle objecting to the issuance of the permit prayed.

2. Thereafter, on July 27, 1944, Division 5, of the Commission, issued and entered its report on reconsideration and order, which the Court adopts, by reference, as a part of these findings, wherein it found, among other things, that the applicant (plaintiff herein) on June 1, 1935, was, and continuously since that time, has been in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce (1) of general commodities, except household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, dangerous explosives, commodities requiring special equipment, and commodities in bulk, over irregular routes; (a) between all points in Alabama within 65 miles of and including Birmingham, on the one hand, and, on the other, points in other states, which are set forth with particularity in the report; and (b) between Mobile, Alabama, on the one hand, and, on the other, all points in Alabama; (2) of household goods, as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M. C. C. 467, between Birmingham, Alabama, on the one hand, and, on the other, all points in Mississippi, Tennessee, Florida, Georgia, Louisiana, and Virginia over irregular routes.

3. Division 5 further found in its report on reconsideration, dated July 27, 1944, that the applicant (plaintiff herein) was, on July 1, 1935, and continuously since, has been, in bona fide operation in interstate or foreign commerce as a contract carrier by motor vehicle over irregular routes under individual contracts or agreements with persons (as defined in Section 203(1) of the Interstate Commerce Act) who operate retail stores, the business of which is the sale of food (1) of such merchandise as is dealt in by wholesale, retail, and chain grocery stores, and in connection therewith, equipment, materials and supplies used in the conduct of such business, between Birmingham, Alabama, on the one hand, and, on the other, all points in Alabama within the territory in that State described in said

report at foot note 9, and Aberdeen, Columbus, and West Point, Mississippi, and Columbia, Lawrenceburg, and Pulaski, Tennessee, and (2) of flour, canned goods and dried fruits from rail sidings at Decatur, Florence, Sylacauga, Alexander City, Anniston, Talladega, Gadsden, and Montgomery, Alabama, Aberdeen and Columbus, Mississippi, and Lawrenceburg and Pulaski, Tennessee, to points within 50 miles of each respective rail siding located within the territory described in footnote 9 of the report of July 27, 1944.

4. Division 5, in its report on reconsideration, dated July 27, 1944, further found that the holding by applicant (plaintiff herein) of the certificate and the permit would not be consistent with the public interest and with the national transportation policy declared in the Act and required the applicant to make an election either to divest itself of the common carrier or contract carrier operations.

5. On August 30, 1944, applicant (plaintiff herein) filed a petition for reconsideration of the order of July 27, 1944, and on September 8, 1944, it filed another such petition and on September 7, 1944, another such petition was filed by a protesting carrier, all of which were denied by the Commission on November 7, 1944.

6. The plaintiff in this action makes no complaint in respect of the report on reconsideration and order issued by the Commission on July 27, 1944, except in so far as the plaintiff is restricted to operations as a common carrier between points in a base area comprised of Birmingham, Alabama, and all points within 65 miles of that city, on the one hand, and, on the other, the points in other states, hereinbefore referred to in these findings. Plaintiff claims that the Commission should have granted authority to it to perform operations between all points in Alabama, on the one hand, and, on the other, the points in other states, hereinabove mentioned. The plaintiff does not question the correctness of the statements of fact found in the report of the Commission of July 27, 1944. Except for one exhibit received in evidence by the Commission, the evidence received by the Commission has not been offered or received in evi-

dence in this case and hence the findings of fact in the Commission's reports, for the purposes of this suit, must be taken as supported by substantial evidence.

7. The statements of fact and the findings and conclusions of the Commission, as set out in said report on reconsideration, are sufficient to support the Commission's order.

Conclusions of Law

1. This Court has jurisdiction of this suit to set aside an order of the Interstate Commerce Commission and of the parties thereto.

2. The proceedings before the Commission, which resulted in said report on reconsideration and order of the Commission, were within the lawful jurisdiction of the Commission, were made after due notice to all interested parties, a fair hearing, and upon substantial evidence.

3. The limitation upon the base area within the State of Alabama, to or from which the plaintiff may operate as a common carrier to or from points in other states, was and is warranted by the law and facts shown by the Commission's report on reconsideration.

4. The report and order of the Commission and the enforcement thereof will not deprive the plaintiff of any constitutional or legal right.

5. The plaintiff is not entitled to the relief it prays and this suit should be dismissed for want of equity.

Entered this the 5th day of March, 1945.

Leon McCord,
United States Circuit Judge;
T. A. Murphree,
United States District Judge;
Clarence Mullins,
United States District Judge.

Filed March 5, 1945

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION.

Civil Action No. 5610

ALABAMA HIGHWAY EXPRESS, INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

Order of Dismissal

The above-styled cause came on for final hearing before the duly constituted three-judge Court on February 5, 1945, and was submitted for final decree upon the pleadings and evidence consisting of Exhibit No. 29 filed at the hearing held on October 16 and 17, 1939, at Birmingham, Alabama, as certified by the Interstate Commerce Commission on February 2, 1945, the arguments and briefs of counsel for the respective parties; and the Court having considered all matters pertaining to the action herein and having reached the conclusion that the complaint herein should be dismissed at the cost of the plaintiff, and having duly entered its findings of fact and conclusions of law:

It is, therefore, Ordered and adjudged that the complaint as amended in this cause and this action be and the same are hereby dismissed at the cost of the plaintiff. Execution may issue for the collection of the costs.

March 5th, 1945.

LEON MCCORD,
United States Circuit Judge;
T. A. MURPHREE,
United States District Judge.
CLARENCE MULLINS,
United States District Judge.

Filed April 3, 1945

In the District Court of the United States for the Northern District of Alabama, Southern Division

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CIVIL ACTION No. 5610

ALABAMA HIGHWAY EXPRESS, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] entered March 5, 1945, of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission. The Commission's report and order, dated July 27, 1944, granted appellant a certificate

[1] The Court also made findings of fact and conclusions of law.

of public convenience and necessity under the "grandfather" clause of Section 206 (a) of Part II of the Interstate Commerce Act (49 U. S. C. 306 (a) to operate as a common carrier by motor vehicle of general commodities, with exceptions not here important, over irregular routes as follows:

> (a) Between all points in Alabama within 65 miles of and including Birmingham, on the one hand, and, on the other, Louisville, Ky., and New Orleans, La.; all points in Indiana, Mississippi, and Tennessee; all points in that part of Florida on and bounded by a line beginning at Clearwater, Fla., and extending along Florida Highway 17 to Tampa, Fla., thence along U. S. Highway 92 to Orlando, Fla., thence along U. S. Highway 441 to the junction of U. S. Highway 41, thence along U. S. Highway 41 to the junction of U. S. Highway 129, thence along U. S. Highway 129 to the Florida-Georgia State line, thence along the Florida-Georgia State line to the Florida-Alabama State line, thence along the Florida-Alabama State line to the Gulf of Mexico, and thence along the Gulf of Mexico to the point of beginning; all points in Georgia on and west of U. S. Highway 129; all points in that part of Illinois on and bounded by a line beginning at the Indiana-Illinois State line and extending along U. S. Highway 36 to Springfield, Ill., thence along Illinois Highway 29 to Peoria, Ill., thence along Illinois Highway 116 to Metamora,

Ill., thence along Illinois Highway 89 to the junction of U. S. Highway 34, and thence along U. S. Highway 34 to Chicago, Ill., thence along Lake Michigan to the Illinois-Indiana State line, and thence along the Illinois-Indiana State line to the point of beginning; and all points in that part of Ohio on, west, and north of a line beginning at a point on the Ohio-Pennsylvania State line, near Sharon, Pa., and extending along U. S. Highway 62 to Columbus, thence along U. S. Highway 23 to Circleville, Ohio, and thence along U. S. Highway 22 to Cincinnati, Ohio; and

(b) Between Mobile, Ala., on the one hand, and, on the other, all points in Alabama.

The Commission's order, however, denied appellant's application in so far as it claimed the right to operate as a common carrier of general commodities between an enlarged base area embracing all points within the State of Alabama, on the one hand, and, on the other, the points and territory outside of Alabama above-mentioned. As heretofore set forth, the order limited the base area to "all points in Alabama within 65 miles of and including Birmingham." The appellant does not claim that the limitations in respect of operations to and from points and territory outside of Alabama were erroneously imposed by the Commission. Other provisions of the Commission's report and order are not attacked in this action.

Service of the appeal papers upon appellees was not effected within the 5-day period prescribed by Rule 12, paragraph 2 of the Revised Rules of the Supreme Court, for it was not until March 19, 1945, that the appeal papers were received by appellees. A statement directing attention to Rule 12, paragraph 3 of such Rules was not served upon appellees, as prescribed by paragraph 2 of that Rule. Further, it does not appear that notice of appeal was served upon the Attorney General for the State of Alabama, in accordance with the provisions of the United States Code, Title 28, Section 45a.

The report and order of the Commission here attacked were issued on reconsideration, at the appellant's request, of an earlier report of the Commission, dated July 6, 1942, (attached to appellant's complaint as Exhibit D—not to be printed in full in the permanent series of motor carrier reports of the Interstate Commerce Commission) which had also denied appellants authority to operate as a common carrier of general commodities between all points in Alabama, as a base area, on the one hand, and, on the other, points and territory outside of Alabama. Although appellant's praecipe now attempts to bring before the Supreme Court the evidence before the Commission, that evidence, except for one exhibit, was not made a part of the record before the district court (see Fdg. 6). Accordingly, the Commission's findings of fact must be assumed to be supported by evidence,

and the only question is whether the Commission's decision based on the findings is erroneous in law. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286, and cases cited.

The basis for the Commission's action in refusing to grant the additional authority sought is indicated by the following statement from its opinion on reconsideration:

> *Alabama:* Authority is sought to serve all points in Alabama in connection with operations to and from points in the States described in footnote 3. As shown in the appendices hereto, applicant's abstract of shipments transported prior to June 1, 1935, discloses approximately 743 shipments moving to or from points in Alabama, of which approximately 253 were out-bound, and approximately 490 were in-bound. After the statutory date, approximately 4340 shipments were transported to or from points in Alabama, of which approximately 1750 were out-bound, and approximately 2590 were in-bound. Of the 743 shipments transported prior to June 1, 1935. 566, or about 76 percent, moved from or to 14 scattered points in Alabama within 65 miles of and including Birmingham, and about 20 percent moved to or from Mobile, Montgomery, and Wetumpka. Of the 4340 shipments transported after the statutory date, 3558, or about 82 percent, moved from or to the same points in the 65-mile Alabama territory, and about 11 percent moved to or from Mobile, Montgomery, and Catherine, Ala-

bama. Catherine was served only once during 1934 and the first five months of 1935, and Wetumpka was served only nine times after the statutory date, during a period of about four years. However, the evidence establishes that prior to and continuously since the statutory date applicant has served a number of widely scattered points within 65 miles of and including Birmingham in connection with its common carrier operations to and from points in other States. True, a large number of points in such territory were not served prior to June 1, 1935, but enough were served to be representative of the whole, and to show the fulfillment of a purpose to provide a transportation service therein. Viewing applicant's operations within the described Alabama territory as a whole, we are of the opinion that they have been of such substantial nature since prior to the statutory date as to warrant the granting to it of authority to continue operations between all points in such territory, on the one hand, and, on the other, points in described territories in other States. The scope of applicant's operations in the other States is hereinafter treated under separate captions. The extent of applicant's operations between Mobile and Montgomery and points in other States is somewhat narrower both as to number of shipments transported and points served. Between January 1, 1934, and June 1, 1935, applicant transported 13 shipments to Mobile, including one from

one point in Ohio, eight from one point in Tennessee, three from one point in West Virginia, and one from one point in Georgia. In the reverse direction, 20 shipments were transported from Mobile, including two to one point in Georgia, three to two points in Illinois, two to two points in each of Indiana, Kentucky, and Mississippi, one to one point in Missouri, four to three points in Ohio, and four to two points in Tennessee. To Montgomery, 29 shipments were transported, including five from one point in Florida, four from two points in each of Tennessee and Illinois, six from two points in Indiana, two from one point in Kentucky, one from one point in each of Georgia, Louisiana, and New Jersey, two from two points in Ohio, and three from one point in West Virginia. No shipments were transported in the reverse direction from Montgomery. It is clear that the service performed prior to the statutory date between Mobile and Montgomery and points in the States indicated has been sporadic in character, insubstantial in respect of shipments transported, and limited as to number of points served. In comparison with the total number of shipments transported, operations to and from Mobile and Montgomery have been less substantial since the statutory date. Service at Catherine and Wetumpka appears to have been only incidental to applicant's principal operation, and such service is also lacking in essential substantiality and con-

sistency since prior to the statutory date. The limited, sporadic, and insubstantial service provided at Mobile, Montgomery, Catherine, and Wetumpka, since prior to June 1, 1935, does not warrant a grant of "grandfather" authority to serve these points, and we so find.

As appears from appellant's jurisdictional statement, the principal grounds of attack upon the Commission's order are that it acted arbitrarily and capriciously, in excess of its statutory power, and contrary to the indisputable character of the evidence, in limiting the appellant's base area to less than the State of Alabama, and that it misapplied the law to the indisputable facts as shown by the order of the Commission and the record in this case. It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

The legal standard to be employed by the Commission in determining the geographical scope of operations during the "grandfather" period is prescribed by the Supreme Court in *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 480–481. There it was said that the Act provides the test of "bona fide operation" which connotes "substantial as distinguished from incidental, sporadic or infrequent service," and that "the precise delineation of the area or the specification of localities which may be serviced has been entrusted by

the Congress to the Commission." See also *Howard Hall Co.* v. *United States,* 315 U. S. 495, 498–499, and *Jack Cole Company, Inc.,* v. *United States,* decided by the District Court for the Northern District of Alabama, Southern Division, on September 7, 1944, motion to affirm granted by the Supreme Court on February 12, 1945. It is plain from the above-quoted portions of the Commission's report that it applied this standard. It cannot be said that as a matter of law the Commission was required to hold that the sporadic service to a few points outside the Birmingham area was sufficient to entitle appellant to the enlarged grandfather certificate which it seeks.

Since the Commission has thus applied the correct legal test, its findings as to substantiality of the service in particular areas must be sustained unless patently in error on their face. *Alton R. Co.* v. *United States,* 315 U. S. 15; *United States* v. *Carolina Carriers Corp., supra,* 482–483. So far as the limitation to the Birmingham base area here involved is concerned, it is significant that the Supreme Court has sustained two other Commission decisions restricting the size of this same base area. *Howard Hall Co.* v. *United States, supra,* 498–499; *Jack Cole Company, Inc.,* v. *United States, supra.* In a particularly painstaking report the Commission has analyzed in detail the evidence with respect to every point and area involved. The Commission found that ap-

pellant's operation to and from points in Alabama, except to and from points within 65 miles of and including Birmingham, were lacking in essential substantiality and consistency. The District Court's conclusion that the Commission's findings supported the order is clearly correct and should be sustained.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

CHARLES FAHY,
Charles Fahy,
Solicitor General.

DANIEL W. KNOWLTON,
Daniel W. Knowlton,
Chief Counsel,
Interstate Commerce Commission.

U. S. GOVERNMENT PRINTING OFFICE: 1949

No. 1229. ALABAMA HIGHWAY EXPRESS, INC. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Northern District of Alabama. May 28, 1945. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. (1) *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 480–82; *Howard Hall Co.* v. *United States*, 315 U. S. 495, 498–9; (2) *United States* v. *Pan American Corp.*, 304 U. S. 156, 158. *Mr. Leo P. Kitchen* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for appellees.